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No. 96-976

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN HUDSON, LARRY BARESEL, AND
JACK BUTLER RACKLEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This *amicus curiae* brief is submitted in support of the Petitioners, John Hudson, Larry Baresel, and Jack Butler Rackley. By letters filed with the Clerk of the Court, Petitioners and Respondent have consented to the filing of this brief.[1/]

[1/] As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party other than counsel authored this brief in whole or in part; no person or entity, other than *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 9,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives is to ensure the proper administration of justice and to ensure that criminal statutes are construed and applied in accordance with due process.

The NACDL files this *amicus curiae* brief to urge the Court to find that civil sanctions that are not remedial constitute punishment for double jeopardy purposes. Any civil proceeding brought by the government involving imposition of civil monetary penalties as a sanction that does not involve injury to the government itself should be considered presumptively punitive. The government in such situations must demonstrate that the sanctions it is seeking are consistent with remedying the defendant's unlawful actions and are not sought for the purposes of retribution or deterrence.

Congress has adopted a wide array of civil statutes that impose large civil monetary fines and penalties on parties found to have violated civil statutes; the legislature has also created criminal actions that allow punishment of the same

conduct. When the purposes of the civil and criminal proceedings are the same, *i.e.*, punitive, the government violates the Double Jeopardy Clause when it brings two successive actions.[2/]

SUMMARY OF ARGUMENT

Petitioners were officers or directors of several small banks in Oklahoma and were subjected to civil and administrative penalties based on their violations of federal banking statutes prohibiting insider or nominee lending transactions. Petitioners were later indicted on criminal charges arising from the same alleged insider lending transactions.

The question raised by Petitioners is whether imposition of civil monetary fines by federal regulatory authorities in addition to other administrative sanctions, in particular non-participation or debarment sanctions, constitutes punishment for purposes of the Double Jeopardy Clause of the Fifth Amendment. Civil fines are punitive rather than remedial when calculation of the fines or monetary penalties is not tied specifically to an assessment of the investigative costs or harm suffered by the government. Here, the fines involved were patently punitive in nature. This fact is further supported by the imposition of additional non-participation or debarment sanctions against Petitioners. The revocation of the ability of Petitioners to participate in the banking industry

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[2/] The NACDL does not dispute that the government may seek reimbursement of its actual investigatory costs, disgorgement of illicit profits, *in rem* civil forfeiture, or restitution to injured third parties in appropriate proceedings parallel to a criminal prosecution for the same violative conduct.

is sufficient to protect the integrity of the banking system and the interests of depositors, and thus accomplishes the government's remedial goals. Additional monetary penalties (in the absence of any proof of injury or actual costs to the government) only serve to deter others from similar activities and to punish the Petitioners.

This case is yet another example of a federal agency attempting to blur the distinction between civil and criminal proceedings in order to impose multiple punishments upon defendants and dilute their double jeopardy rights. In *United States v. Halper*, 490 U.S. 435 (1989), this Court proscribed the subsequent use of civil proceedings to punish defendants further when they had already been punished in a prior criminal proceeding. In this case, the inverse situation has occurred with the same potential substantive result. This Court should effectuate the principles of the Double Jeopardy Clause by overturning the lower court's ruling as inconsistent with the reasoning in *Halper*.

ARGUMENT

I. CRIMINAL PROSECUTION AFTER IMPOSITION OF PUNITIVE CIVIL OR ADMINISTRATIVE SANCTIONS VIOLATES THE DOUBLE JEOPARDY CLAUSE

A. Non-Remedial Civil Monetary Fines are "Punishment" for Double Jeopardy Purposes

The Double Jeopardy Clause prohibits the government from seeking civil punitive sanctions against a defendant and thereafter criminally prosecuting the defendant for the same

conduct in a separate proceeding.[3] In *United States v. Halper*, this Court held "that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole." 490 U.S. 435, 451 (1989). Although the order of the civil and criminal proceedings in the instant case is the reverse of *Halper*, *Halper*'s holding controls the facts of this case. When a civil sanction is punitive, the order of the criminal and civil proceedings seeking to punish the defendant is irrelevant to the application of the Double Jeopardy Clause.[4] The government may not circumvent a defendant's constitutional protection from multiple punishment by labeling a punitive proceeding as "civil." *See Halper*, 490 U.S at 447 n.7 ("in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes

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[3] U.S. Const. amend. V: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

[4] *See United States v. Stoller*, 78 F.3d 710, 715 (1st Cir.) ("[A]s long as a civil sanction constitutes punishment . . . it does not matter if the 'multiple' punishment . . . precedes the attempt to impose the sanction, or conversely, if the sanction precedes the attempt to convict the defendant."), *cert. dismissed*, 117 S. Ct. 378 (1996); *United States v. Sanchez-Escareno*, 950 F.2d 193, 200 (5th Cir. 1991) ("[T]he *Halper* principle that a civil penalty can be factored into the double jeopardy matrix should apply whether the civil penalty precedes or follows the criminal proceeding."); *United States v. Bizzell*, 921 F.2d 263, 266-67 (10th Cir. 1990); *United States v. Mayers*, 897 F.2d 1126, 1127 (11th Cir. 1990). This Court left this particular question open in *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 781 n.21 (1994). In dissent, Justice Scalia stated that if the claim is for multiple punishment, the "order of punishment cannot possibly make any difference." *Id.* at 804 (Scalia, J., dissenting).

actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated"); *see also United States v. La Franca*, 282 U.S. 568, 573 (1931) ("The term 'penalty,' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution.").

When a civil statute is utilized to effectuate society's goals of retribution and deterrence, a subsequent criminal prosecution subjects a defendant to multiple prosecutions and punishments. In a prior opinion in the case at bar, *United States v. Hudson*, 14 F.3d 536, 540 (10th Cir. 1994) ("*Hudson I*"), the Tenth Circuit correctly read *Halper* to this effect, recognizing that to the extent that the purpose and application of a penalty serve to deter unlawful conduct, the penalty is necessarily punitive. The court quoted *Halper*, which held that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *Hudson I*, 14 F.3d at 540 (citing *Halper*, 490 U.S. at 448-49); *see also Austin v. United States*, 509 U.S. 602, 610 (1993). The Tenth Circuit correctly stated in *Hudson I* that:

> if a particular remedial sanction can only be understood as also serving punitive goals, then the person subjected to the sanction has been punished despite that fact that the sanction is also remedial. To conclude otherwise effectively invalidates the Double Jeopardy Clause by allowing multiple punishments for the same conduct merely because the punishments also serve remedial purposes.

Hudson I, 14 F.3d at 540. Fundamentally, therefore, if a sanction effects deterrence and retribution, it is punishment for double jeopardy purposes.[5]

Whether a sanction is civil or criminal is primarily a question of statutory construction; however, this Court has repeatedly recognized that "a civil label is not always dispositive," and the legislature's characterization of a sanction as civil will be rejected when there is clear proof that the statute is "so punitive either in purpose or effect as to negate" the government's intent to label the punishment "civil." *Kansas v. Hendricks*, 1997 WL 338555, at 7 (U.S. June 23, 1997) (internal quotations omitted); *see also Halper*, 490 U.S. at 447.

The civil monetary fines at issue in this case are generally labeled "civil," but there are at least five strong indications of punitive intent by the legislature. First, the text of the penalty provisions, 12 U.S.C. §§ 93(b), 504, each provide that the Office of the Comptroller of the Currency ("OCC") "shall" impose a penalty of not more than $1,000 per day for certain violations of law. By linking the payment of a penalty to the commission of a crime, the legislature strongly indicated its "penal" intent. *Kurth Ranch*, 511 U.S. at 781 (citing *United States v. Constantine*, 296 U.S. 287, 295

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[5] *See United States v. La Franca*, 282 U.S. 568, 573 (1931); *United States v. Chouteau*, 102 U.S. (12 Otto) 603, 611 (1881) ("[the] character [of a money penalty] is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution"); *accord United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 116 S. Ct. 2106, 2110-11 (1996).

(1935)); *see also Austin*, 509 U.S. at 619-20.[6/] Second, the monies recovered under the statute are paid to the Treasury of the United States, not to the supposedly injured banking institutions, *see* 12 U.S.C. §§ 93(b)(8), 505(7), suggesting that the purpose is not remedial in nature. Third, injured persons and institutions may recover "all damages" from officers and directors under specific remedial provisions in the same statute. *See* 12 U.S.C. §§ 93(a), 503. Fourth, the banking statute at issue requires a finding of *scienter* (*i.e.*, that defendants knowingly committed banking violations). *See* 12 U.S.C. §§ 93(b), 1818(e),(i). In determining whether a sanction is punitive, this Court has stated that the existence of a *scienter* requirement and strong retributive and deterrent objectives indicate that a sanction is "punishment." *See Hendricks*, 1997 WL 338555, at 7-8.[7/] Fifth, the relevant

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[6/] The indictments against the Petitioners for violations of 18 U.S.C. §§ 2, 371, 656, & 1005 are based on the same conduct as the civil banking law violations.

[7/] In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), the Court listed the following factors in considering whether a sanction is penal or regulatory:

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . .

Id. at 168-69 (footnotes omitted).

statutes do not calculate the amount of the fine on the basis of remedying any harm the government may have suffered or the reimbursement of investigative costs. To the contrary, the amount of the fine is determined in accord with a "civil" penalty matrix, which considers far more than any injury or costs imposed on the government by any acts of defendants.[8/] These five factors are all inconsistent with the remedial purpose suggested by the government and the court below in *United States v. Hudson*, 92 F.3d 1026 (10th Cir. 1996) (*"Hudson II"*).[9/]

The same fundamental features which led this Court to conclude that the tax in *Kurth Ranch* constituted punishment apply to the fines at issue here. In its initial action seeking civil fines against Petitioners, the government did not claim that it sought either recompense for any harm it suffered or

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[8/] *Hudson I* stated the factors that are utilized in the matrix:

> The amounts of money that may be assessed [under the statutes] is stated in terms of the number of days that each violation continues. In addition, both statutes require the OCC to take into account the financial resources and good faith of the person against whom sanctions are sought, the gravity of the violation, the history of previous violations, and any other factors that justice may require, in determining the appropriate sanction to impose.

Hudson I, 14 F.3d at 542 (citation omitted).

[9/] *See also Kurth Ranch*, 511 U.S. at 774 (finding that a drug tax was punitive because the tax was imposed on criminals only; the aims of the drug tax law were the same as those of criminal statutes; the drug tax applied to behavior that was already a crime; the tax allowed for sanctions by restraint of the defendant's property; imposition of the tax required a finding of intent; and the tax appeared excessive).

reimbursement of any investigative costs. Instead, the civil proceeding was imbued with the criminal goals of retribution and deterrence.[10/]

When the government itself has not been harmed, as here, the punitive nature of civil monetary fines is even more apparent. *Halper* established the following rule for cases in which the government seeks recovery for an injury:

> [w]here a defendant previously has sustained a criminal penalty, and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the

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[10/] Petitioners had a strong interest in resolving any risk of punishment in the "civil" proceeding. The Double Jeopardy Clause, which is meant to protect Petitioners' right to finality, was:

> designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957); *see also* Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 PA. L. REV. 101, 135 (1995).

Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

Halper, 490 U.S. at 449-50. Because the government in this case did not sustain an injury, the civil monetary fines are not related to any goal of compensating the government, but rather the fines constitute punishment. *See id.*

Civil monetary fines retained by the government when it was not the victim of unlawful conduct cannot be justified *post hoc* as reimbursement of costs.[11/] The Tenth Circuit improperly allowed this result in *Hudson II*. In the proceedings below, the government made a rough approximation of the percentage of two government employees' time that was spent working on the underlying investigation, and equated those portions of the employees' salaries to an approximation of the government's costs. But the fines in this case had not originally been calculated by assessing the government's costs, rather the fines were imposed after a negotiated settlement, and the original amount sought by the government was based on the applicable federal statute.[12/] Once the government realized

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[11/] The fact that the fines here were negotiated downward to an amount that does not appear excessive is not relevant to the nature of the fines. *See Kurth Ranch*, 511 U.S. at 780 (noting that the amount of the tax is not dispositive); *Halper*, 490 U.S. at 452 (stating that "a money sanction can be reasonably related to one's violations and still be used as punishment"). Reasonableness of the fines only becomes an issue if the government alleges a precise injury. *See Hudson I*, 14 F.3d at 543.

[12/] If the government can justify a fine as reimbursement for investigatory costs, then it may be tempted to define "costs" very broadly, as it did in this case. The primary purpose of civil monetary fines is clearly not to reimburse the government for its costs, but to deter and

that it had to produce evidence of investigatory costs to attempt to justify the civil fines as remedial, it invented the "rough approximation" described above. Such a *post hoc* rationalization is not legitimate and should not be upheld by this Court. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("[C]ourts may not accept . . . counsel's *post hoc* rationalizations for agency action."). Congress may choose to authorize recovery of investigative costs, but until it does so expressly, the government's costs cannot be shifted to private parties. *See Missouri v. Hunter*, 459 U.S. 359, 366 (1983) (stating that a court cannot impose a sanction not authorized by the legislature).

This Court should adopt the Seventh Circuit's approach in holding that an *ex post facto* finding that a fine approximates the government's cost of investigation is not sufficient to alter the punitive nature of the fine. *See S.A. Healy Co. v. OSHA*, 96 F.3d 906 (7th Cir. 1996) (prohibiting the criminal prosecution of defendant company that had already paid civil fines for violations of the law involving the same conduct). The *Healy* court, in determining that the civil statute imposed a punitive sanction, looked to the factors that the agency considered in determining the amount of the civil fine, including the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations. *Id.* at 909. The court also noted that consideration of loss to the government or costs of investigation or prosecution were not among the factors to be

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punish the sanctioned party. *See Hicks v. Feiock*, 485 U.S. 624, 633 (1988) (an indeterminate sanction looking to the future is a civil remedy while an "unconditional penalty is criminal in nature because it is 'solely and exclusively punitive in character'") (quoting *Penfield Co. v. SEC*, 330 U.S. 585, 593 (1947)).

considered. *Id.* The court went on to state that where the government is not a victim, a fine cannot be justified as a remedy. *Id.* at 910. The private citizens who were victims of the defendant's misconduct were free to pursue their own private causes of action for damages as a remedy.[13/] When fines are not to be used to compensate the victim but instead serve the purposes of general and specific deterrence — criminal law objectives — the fines are punitive. *Id.* A contrary holding would lead to "multiplying costs of the investigations . . . justify[ing] still more proceedings and the imposition of additional fines" for the same offense. *Id.*

Because the civil monetary fines in this case are patently punitive and their imposition amounts to punishment, allowing the government to initiate a criminal proceeding following the imposition of such "civil" penalties would be inconsistent with the Double Jeopardy Clause.

B. The Simultaneous Imposition Here of Non-Participation or Debarment Sanctions Demonstrates that the Civil Monetary Penalties Are Not Remedial

Apart from making the government whole through reimbursement of costs of investigation and payment of damages incurred by the government, the sole remaining remedial goal the government should be allowed to pursue

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13/ If this Court holds, as it should, that the government cannot seek in successive proceedings both punitive civil and criminal sanctions against a defendant, the right of the government or a private party to seek compensation or other remedial relief when it has been the victim of the defendant's unlawful conduct would not be affected. Only multiple punitive sanctions are barred by the Constitution.

against Petitioners is to protect the integrity of the banking system and the interests of depositors.[14/] That remedial goal is completely satisfied by the administrative non-participation or debarment sanctions imposed on Petitioners. Supplementing those administrative debarments with civil monetary fines having no relationship to the government's costs and damages serves solely a punitive purpose.

Here, Petitioners were subjected to lifetime bars from the banking business, as well as civil monetary penalties. Despite the Tenth Circuit's holding in *Hudson I* that such debarments were "solely remedial," 14 F.3d at 542, comparable administrative suspension or bar orders have been deemed "punitive" as well as remedial.[15/] Amicus NACDL believes the debarments here were penal as well as remedial.[16/] However, assuming *arguendo* the correctness of

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[14/] *Hudson I*, 14 F.3d at 541-42 ("[T]he OCC's use of debarment as a means of protecting the integrity of the banking system and the interests of the depositors is a legitimate remedial purpose that need not necessarily be defined as also serving as deterrence or retribution.").

[15/] *See, e.g., In re Ruffalo*, 390 U.S. 544, 550 (1968) ("Disbarment, designed to protect the public, is a punishment or penalty imposed upon the lawyer."); *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996) (six month broker-dealer suspension held to be "punitive"); *Collins Sec. Corp. v. SEC*, 562 F.2d 820, 825 (D.C. Cir. 1977) (securities law broker-dealer debarment held to be "punitive"; "Disbarment or suspension [of an attorney] is equivalent to the penalty imposed on Collins by the SEC here."); *Beck v. SEC*, 430 F.2d 673, 674 (6th Cir. 1970) (four month broker-dealer suspension held to be "punitive, not remedial").

[16/] When a person is barred for life from a profession, the sanction is punitive as well as remedial because it is not based on a finding that the person is not competent currently. Numerous professions require professional licenses, and permanent or long term debarment from a

the Tenth Circuit's finding that the debarments in this case were solely remedial, administrative debarment *plus* civil monetary penalties here certainly constitute punishment because the debarments alone serve all the remedial purposes the government is entitled to pursue; the additional fine is wholly punitive. If the integrity of the banking industry and the protection of depositors are satisfied by the debarment of Petitioners, there is no rational reason for the government also to fine them (in the absence of governmental harm) except to punish them. The monetary fine in no way remedies harm to depositors or damage to the banking industry. Upholding the punitive civil fine and allowing subsequent criminal prosecution for the same underlying

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profession has in many instances more punitive effects on a person's life than would a brief period of incarceration or a monetary fine. *See Ex Parte Burr*, 22 U.S. (9 Wheat) 529, 529-30 (1824) ("[T]he profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise."). When debarments are long term or permanent and not based on a finding of unfitness, then they are punitive and should constitute punishment for double jeopardy purposes. *See also* Securities Exchange Act of 1934, Release No. 34-34720 (Sept. 26, 1994), 57 SEC Docket 1710 (stating that with regard to the SEC's policy regarding the imposition of bars from the security industry that are for an unspecified amount of time (*i.e.*, unqualified bars), an unqualified bar does not allow for re-application at some later date, but instead that an unqualified bar is a permanent exclusion from the securities industry).

In *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996), the court found a six month broker-dealer suspension under the federal securities laws was a penalty even though it also may have served a remedial purpose. The court found that Johnson's suspension "would less resemble punishment if the SEC had focused on [her] current competence or the degree of risk she posed to the public." *Id.* at 489. Because the SEC did not prove Johnson posed any current risk to the public, her suspension obviously was not grounded in an effort to protect the public from future harm due to professional unfitness. Therefore, the suspension was punitive.

conduct is inconsistent with the Double Jeopardy Clause and should not be sanctioned here.

II. THE MODERN BLURRING OF THE DISTINCTION BETWEEN CRIMINAL AND CIVIL PROCEEDINGS MUST NOT DILUTE THE HISTORIC PROTECTION OF THE DOUBLE JEOPARDY CLAUSE

Dissatisfied with the frequency or efficacy of criminal prosecutions by the Department of Justice of a variety of white-collar or business crimes in the past 25 years, Congress has embarked on a modern trend of granting federal administrative agencies and departments statutory authority to seek civil or administrative monetary sanctions for statutory violations that also may be subject to parallel criminal prosecution by the Department of Justice.[17/]

[17/] The blurring of the traditional civil-criminal distinction in federal law enforcement and the federal regulation of business, and the problems engendered thereby, has been the subject of much recent academic literature. *See, e.g.*, Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991) (arguing that legislative intent should be the primary determinant of whether a proceeding is civil or criminal); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992) (advocating a three-tier legal system, which would be comprised of criminal proceedings, civil proceedings seeking punitive sanctions, and civil proceedings seeking remedial sanctions, and arguing for an increase in civil-punitive sanctions as a replacement for many criminal proceedings); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models — and What Can Be Done About It*, 101 YALE L.J. 1875 (1992) (responding to Mann article, and arguing that increased enforcement of punitive sanctions by administrative agencies has resulted in overcriminalization of conduct); Carol S. Steiker,

Congress in recent years has empowered a conglomeration of federal administrative agencies and departments to seek more punitive civil sanctions for a variety reasons.[18/] Thus, in

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Foreword to Twenty-Sixth Annual Review of Criminal Procedure: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide, 85 GEO. L.J. 775 (1997) (arguing that courts should focus on a definition of "punishment" that should not depend on procedural protection at issue, and advocating use of factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

[18/] *See* Mann, *supra* note 17, at 1844-45. In analyzing the trend of adding civil monetary penalty provisions to federal regulatory statutes, Kenneth Mann rationalized why Congress chose in 1986 to give federal administrative agencies authority to impose administrative false claims penalties under the False Claims Act:

> In voting to secure these and other statutory changes, Congress acted in the belief that a large portion of the fraud detected escaped sanction because existing institutional structures were inadequate to respond to them. The federal criminal system was already overloaded with complex and serious cases, and expanding its capacity would have entailed heavy costs. The hybrid administrative penalty opened the way for more cost-efficient and streamlined methods for punishing criminals. It expanded the availability of sanctions for false claims and several other regulatory offenses, thereby increasing the deterrent powers of government agencies without enlarging the field of criminal law. This change reflected a growing belief that administrative agencies need direct enforcement powers that are similar but not identical to criminal prosecution. Congress gave "prosecutorial" powers to administrative agencies without making these agencies part of the criminal process. Equally important, lawmakers seem to have thought of the criminal process as somehow inappropriate for "less serious" cases. Most wrongdoers charged with white-collar

addition to the civil monetary penalties that can be sought by federal banking authorities under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (codified as amended in scattered sections of 12 U.S.C.), similar punitive "civil" monetary penalties can now be imposed administratively or be sought in federal court in civil actions by the Occupational Safety and Health Review Commission, the Securities and Exchange Commission, the Department of Health and Human Services, the Federal Communications Commission, the Internal Revenue Service, the Federal Trade Commission, the Commodity Futures Trading Commission, the Environmental Protection Agency, and the Department of Agriculture, among other agencies and departments.[19/]

> offenses, it was thought, could be sanctioned effectively by a "civil" process, even though their actions amounted to statutorily defined crimes.

Id. at 1850 (footnotes omitted).

[19/] The Occupational Safety and Health Review Commission ("OSHRC") may impose civil fines for violations of the Occupational Safety and Health Act ("OSHA"), 29 U.S.C. § 666; the Securities and Exchange Commission ("SEC") may seek treble civil monetary penalties for insider-trading violations, pursuant to the Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. § 78u-1(a)(3); the Department of Health and Human Services ("HHS") may impose civil monetary fines for federal health care program fraud pursuant to the Civil Money Penalties Law of 1981, 42 U.S.C. § 1320a-7a; the Federal Communications Commission ("FCC") may impose civil fines for violations of FCC regulations pursuant to 47 U.S.C. § 203; the Internal Revenue Service ("IRS") may impose penalties for tax violations such as failure to file, 26 U.S.C. § 6677, and for aiding and abetting understatement of tax liability, 26 U.S.C. § 6701; the Federal Trade Commission ("FTC") may recover civil penalties for violations of rules regarding unfair or deceptive practices, pursuant to 15 U.S.C. § 45(m);

White collar crimes generally require more investigation than other crimes. Administrative agencies bring both more investigative resources and more expertise in the substantive conduct to bear on law enforcement's efforts to deter illegal behavior. Criminal procedural protections contained in the Fifth and Sixth Amendments of the Constitution generally are not required in civil/administrative proceedings. Evidentiary burdens are lighter in civil/administrative cases than in criminal proceedings because administrative agencies must only prove their cases by a preponderance of evidence rather than beyond a reasonable doubt. Further, at least one commentator argues that federal agencies tend to have home court advantage before administrative law judges, unlike Article III judges, who arguably may be more objective.[20/]

In addition to the punitive banking law sanctions at issue

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the Commodity Futures Trading Commission ("CFTC") may impose penalties under the Commodity Exchange Act, 7 U.S.C. § 6; the Environmental Protection Agency ("EPA") may impose civil penalties under a myriad of statutes, including, among others, violations of the Clean Water Act, 33 U.S.C. § 1319, and the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6928; and the Department of Agriculture may impose civil fines (*e.g.*, for violating statutes regarding marketing quotas of tobacco, 7 U.S.C. § 1314, and peanuts, 7 U.S.C. § 1359). In 1979, one commentator calculated that there were 348 statutory civil penalties enforced by 27 federal departments and agencies. Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1438 (1979). As evidenced by the statutes cited above, the number of civil penalties available to agencies and federal departments has increased substantially since 1979.

[20/] *See* Coffee, *supra* note 17, at 1887-88 & n.38 (citing American Bar Association study finding that administrative law judges upheld SEC staff in 58 of 62 SEC administrative cases studied over five-year period).

in the case at bar, a pertinent example of the increase in availability of civil/administrative monetary penalties is in the securities area where Congress has authorized the SEC to seek treble monetary penalties against persons engaged in illegal insider-trading, and other designated monetary penalties against violators of securities laws generally.[21/] Congress passed expansive amendments to the federal securities laws authorizing a broad array of civil monetary penalties in 1984, 1988, and 1990. These civil monetary penalties supplement existing and newly expanded civil and administrative sanctions including administrative debarment or suspension orders, license revocations, injunctions, cease and desist orders, and disgorgement or restitution orders. The

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[21/] The Insider Trading Sanctions Act of 1984 ("ITSA"), Pub. L. No. 98-376, 98 Stat. 1264 (codified as amended at 15 U.S.C. §§ 78c, 78o, 78t, 78u, 78ff), established a treble damages penalty and the Insider Trading and Securities Fraud Enforcement Act of 1988 ("ITSFEA"), Pub. L. No. 100-704, 102 Stat. 4677 (codified at 15 U.S.C. § 78u-1(a)(3)), expanded liability for securities law violations. The same insider-trading violations are also punishable through the criminal penalty provisions of the Securities Exchange Act of 1934. *See* 15 U.S.C. § 78ff (providing for criminal penalties of up to $1,000,000 for individuals and imprisonment for up to 10 years). The Securities Enforcement Remedies and Penny Stock Reform Act ("Remedies Act") enacted in 1990 greatly expanded the number and type of punitive sanctions available to the SEC in administrative and judicial enforcement proceedings and established three tiers of penalties relating to the nature of the violation based upon the degree of culpability associated with the mental state of the defendant. Pub. L. No. 101-429, 104 Stat. 951 (1990) (codified as amended in scattered sections of 15 U.S.C.). Civil monetary penalties are available in federal district court for all violations of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisors Act, and the Investment Company Act. In addition, the SEC administratively can impose civil monetary penalties against broker-dealers and other regulated persons. None of the "civil" penalties provisions are tied to the costs of the underlying government investigations.

1984 Act was intended to provide punitive monetary penalties in addition to civil injunctions and disgorgement of illegal profits. The addition of significant "civil" fines, the SEC argued, was needed as a deterrent.[22/] After 1984, there were several high profile insider-trading cases, which prompted Congress to pass the 1988 Act, which authorized even stiffer "civil" penalties. During the hearings on the 1988 Act, law enforcement officials testified that they had been unable to pursue some insider-trading violations because of a lack of resources.[23/]

Congress clearly intended the pervasive and potentially large civil monetary penalties, such as the treble insider-trading penalties, to achieve traditional criminal law enforcement goals; that is, primarily to serve the punitive goals of deterrence and retribution rather than a solely remedial purpose such as recompense to victims or the government.[24/] In authorizing additional "civil" monetary

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[22/] H.R. Rep. No. 100-910, at 11 (1988) (*reprinted in* Gary Lynch & Arthur F. Mathews, INSIDER TRADING AND SECURITIES FRAUD ENFORCEMENT ACT OF 1988, at 44 (1989)).

[23/] *Id.* at 14-15 (*reprinted in* Gary Lynch & Arthur F. Mathews, INSIDER TRADING AND SECURITIES FRAUD ENFORCEMENT ACT OF 1988, at 47-48 (1989)).

[24/] *See* H.R. Rep. No. 98-355, at 2 (1983), *reprinted in* 1984 U.S.C.C.A.N. 2275 (stating that the "legislation provides increased sanctions against insider trading in order to increase deterrence of violations"); *id.* at 8, *reprinted in* 1984 U.S.C.C.A.N. 2281 ("The Committee believes the new penalty provided by the legislation will serve as a powerful deterrent to insider trading abuses."); *id.* at 13, *reprinted in* 1984 U.S.C.C.A.N. 2286 ("The Committee believes that providing the Commission with the power to seek a civil penalty for violations is the best way to accomplish the goal of deterring insider trading."); *id.* at 26,

penalties, Congress did not change the substantive law governing trading,[25/] but instead provided the SEC with a new "remedy" intended to punish violators to create a more meaningful deterrent against insider-trading. The strictly punitive nature of the "civil" fines is highlighted by the fact that, although the government sustains investigatory and prosecutorial costs, such costs are not factored into the penalty assessment. Further, the fines sharply contrast with the remedial sanction of disgorgement in that monies are paid to the Treasury rather than placed into a fund for the benefit of defrauded investors. Recompense may also be sought in a private action by a plaintiff who, unlike the SEC in seeking fines, must prove damages and reliance to recover against a defendant.[26/] Another characteristic of the "civil" fines, which reinforces that the aim of the fines is to punish wrongdoers, is that liability is imposed only upon a finding that the defendant acted with *scienter*.

The banking fines at issue here are much like the insider-trading penalties under the federal securities statutes. The banking fines here seek retributive and deterrent goals; they exceed the amount of any damage to the government; they require a finding of *scienter*; and the behavior to which the penalties apply already constitutes a crime. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

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reprinted in 1984 U.S.C.C.A.N. 2298 (John S. R. Shad, former chairman of the SEC, expressing the opinion that "[t]his amendment would create a formidable deterrent to illegal insider trading" and stressing the need for proportionality and culpability in assessing ITSA fines).

[25/] *Id.* at 11.

[26/] ITSFEA provided a new Section 20A private right of action to compensate those who are harmed by unlawful securities trading.

This Court should prevent the government's attempt to blur the distinctions between civil and criminal proceedings in this matter. To find otherwise would be to encourage federal agencies to continue to abuse their civil and administrative powers at the expense of defendants' constitutional rights. If bankers can be subjected to multiple punishments in successive civil/criminal proceedings, then successive multiple punishments will become the norm in SEC enforcement cases, as well as enforcement proceedings pursued by a conglomeration of federal administrative agencies and departments.

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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